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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ROBERT MCPHERSON,

Defendant and Appellant.

C078083

(Super. Ct. Nos. 12F6348,
14F4595)

We issued our original decision in this case on March 14, 2016, pursuant to *People v. Wende* (1979) 25 Cal.3d 436, finding no arguable error that would result in a disposition more favorable to defendant and affirming the judgment. The California Supreme Court subsequently granted review and transferred the matter back to us with directions to vacate our original decision and reconsider the cause in light of *People v.*

Buycks (2018) 5 Cal.5th 857 (*Buycks*). Having vacated our original decision and having considered the additional briefs from the parties, we will modify the judgment to strike two prior prison term enhancements imposed on defendant in case No. 14F4595 and affirm the judgment as modified.

BACKGROUND

In case No. 12F6348, defendant pleaded guilty to vehicle theft with a prior felony conviction. (Pen. Code, § 666.5, subd. (a).)¹ He also admitted two prior prison term enhancement allegations based on a 2006 felony conviction for possession of a controlled substance and a 2009 conviction for petty theft with a prior theft conviction. (Health & Saf. Code, § 11377, subd. (a); § 666, 667.5, subd. (b).) On January 7, 2014, the trial court denied probation and sentenced defendant to county jail for six years with a split term consisting of the following: three years in jail and execution of the remaining three years in jail suspended with mandatory supervision for those three years. The trial court ordered credit for time served and awarded 457 days of presentence credit. Defendant did not appeal from his conviction and sentence.

In case No. 14F4595, defendant pleaded no contest to escape while charged with a felony (§ 4532, subd. (b)(1)) and admitted violating his mandatory supervision in case No. 12F6348. Proposition 47, the Safe Neighborhoods and Schools Act, became effective on November 5, 2014. On November 7, 2014, the trial court sentenced defendant to a six-year eight-month state prison term. The trial court granted defendant's request for a certificate of probable cause. On November 26, 2014, the trial court granted

¹ Undesignated statutory references are to the Penal Code.

defendant's section 1170.18 petition to redesignate as misdemeanors the felonies underlying his prior prison term enhancements.²

Defendant appealed, and his appellate counsel filed a brief asking us to review the record pursuant to *People v. Wende, supra*, 25 Cal.3d 436. As part of our *Wende* review, we asked for supplemental letter briefs from the parties. We issued our original decision in 2016 affirming the judgment, but the California Supreme Court subsequently directed us to reconsider in light of the 2018 decision in *Buycks, supra*, 5 Cal.5th 857, and the parties filed additional briefs in this matter.

DISCUSSION

I

Defendant contends his section 667.5 prior prison term enhancements must be stricken. We agree that they must be stricken in case No. 14F4595.

For a prior prison term enhancement to apply, a defendant must have been convicted of a felony and must have served a prison term for that conviction. (§ 667.5, subd. (b).) But Proposition 47, the Safe Neighborhoods and Schools Act (Act), requires “misdemeanors instead of felonies for nonserious, nonviolent crimes . . . unless the defendant has prior convictions for specified violent or serious crimes.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70.) Possession of a controlled substance and petty theft with a prior are now misdemeanors, with certain exceptions not relevant here. (See Health & Saf. Code, § 11377; §§ 490, 666.) Under Proposition 47, felonies reduced under its provisions “shall be considered a misdemeanor for all purposes.” (§ 1170.18, subd. (k).)

² We grant defendant's request for judicial notice of the trial court dockets regarding the two prior felony offenses in case Nos. 06F1735 and 09F0235. (Evid. Code, § 452, subd. (d).)

In *Buycks*, the California Supreme Court held, among other things, that because Proposition 47 is a measure designed to ameliorate punishment, the “ ‘misdemeanor for all purposes’ ” language “requires felony-based section 667.5 and 12022.1 enhancements to be retroactively stricken, but only with regard to judgments that were not final at the time the initiative took effect.” (*Buycks, supra*, 5 Cal.5th at p. 876.) However, in applying section 1170.18, a trial court must “reevaluate the continued applicability of any enhancement based on a prior felony conviction.” (*Id.* at p. 894.)

The Attorney General argues defendant’s prior prison term enhancements became final when his conviction in case No. 12F6348 became final, which was before the Act’s effective date, thereby precluding the retroactive application of section 1170.18, subdivision (k). Defendant counters that his sentencing in case No. 14F4595 necessarily included sentencing on the prior prison term enhancements, which attach to him rather than to a particular offense, and the trial court was authorized to revisit the validity of those enhancements.

We conclude defendant’s prior prison term enhancements must be stricken in case No. 14F4595. The trial court sentenced him in that case after the effective date of Proposition 47, and it also subsequently granted his section 1170.18 petition to redesignate as misdemeanors the felonies underlying his prior prison term enhancements. *Buycks* holds that Proposition 47 is designed to ameliorate punishment and trial courts must reevaluate the continued applicability of enhancements when applying section 1170.18. (*Buycks, supra*, 5 Cal.5th at pp. 876, 894.)

We will modify the judgment to strike the section 667.5 prior prison term enhancements in case No. 14F4595.

II

Defendant claims his conviction in case No. 14F4595 must be reversed because trial counsel was ineffective in failing to assess the Act’s potential impact on his case. We conclude he has not established ineffective assistance.

Defendant was charged in case No. 14F4595 with escape while charged with a felony (§ 4532, subd. (b)(1)) and bringing methamphetamine into a penal institution (§ 4573). The information further alleged six prior prison terms: the two convictions underlying the prison priors at issue in this case, a 2001 conviction for unlawfully taking a vehicle (Veh. Code, § 10851), 1997 and 2000 convictions for possession of a controlled substance, and a 1992 conviction for possession of a controlled substance for sale (Health & Saf. Code, § 11378) . Defendant pleaded no contest to escape and he admitted violating his mandatory supervision in case No. 12F6348.

Defendant claims he agreed to plead guilty to escape and to the violation of mandatory supervision in exchange for dismissal of the remaining charges and enhancements, but he was unaware of Proposition 47 when he entered his plea, and his counsel made no mention of Proposition 47 at sentencing and did not attempt to withdraw the plea. He argues his counsel was ineffective in depriving him of a cogent argument for a mitigated sentence.³

Defendant's claim is based on layers of speculation. We do not know what defendant and his counsel knew at the time of the plea and at sentencing, we do not know what tactical decisions may have been in play, and we do not know if the circumstances would have changed the decisions at the time of the plea or at sentencing. Given the lack of information, defendant has not established that counsel was deficient or that any deficiency was prejudicial.

³ The Attorney General argues this contention is beyond the scope of the Supreme court's remand. But our request for supplemental briefing in the initial appeal asked whether trial counsel was ineffective in failing to seek section 1170.18 relief for the felonies underlying the prison priors.

DISPOSITION

The judgment is modified to strike the two section 667.5 prior prison term enhancements in case No. 14F4595. The judgment is affirmed as modified. The trial court shall amend the abstract of judgment to reflect the judgment as modified and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

/S/
MAURO, J.

We concur:

/S/
HULL, Acting P. J.

/S/
RENNER, J.